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Office-Supreme Court, U.S.
FILED
FEB 15 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1963

No. 116

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants-Appellants,

v.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff-Appellee.

On Appeal from the United States District Court for the Southern District of New York, Three Judges Sitting

BRIEF FOR PLAINTIFF-APPELLEE (WITH APPENDICES)

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BRIEF FOR PLAINTIFF-APPELLEE (WITH APPENDICES)

Preliminary Statement

This case is here for the third time. (370 U. S. 713, June 25, 1962; 32 L W 3137, October 15, 1963.)

Since we cannot accept as sufficiently accurate and complete the "Statement of the Case" in the defendants-appellants' brief (pp. 4-8), we present the following, as a summary of the plaintiff's testimony, exhibits and the findings of fact by the court below (R. 193-4 and 208). The defendants called no witnesses and offered no exhibits.

Concise Statement of the Case

The plaintiff is a New York corporation engaged, with the sanction and cooperation of the Federal Government, in the exportation of unopened bottles of tax-free wines and liquors by foreign-bound planes from the New York International Airport, now the John F. Kennedy Airport, which is operated by the New York Port Authority, an agency of New York and New Jersey, pursuant to an Interstate Compact sanctioned by Congress.

The Joint Resolutions of Congress sanctioning the New York Port Authority (42 Stat. 174 [1921] and 42 Stat. 822 [1922]) expressly stipulated as to the Interstate Compact:

> "nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

The plaintiff leases its premises from the Port Authority for a rental which includes a percentage of its profits. (R. Exs. 5 and 6, pp. 164, 172.)

The plaintiff procures these unopened bottles of wines and liquors from United States Customs bonded warehouses outside New York, where they had been held in bond *for export only.*

In accordance with the forms, regulations of the Bureau of Customs, they were released in bond from the bonded warehouses for export to foreign countries, and were consigned for this purpose to the Chief of the Bureau of Customs at the International Airport.

Transportation from the bonded warehouses to the Airport was by bonded truckers, and also under supervision

by and according to the forms and regulations of the Bureau of Customs.

At the International Airport the plaintiff occupies in the Arrivals Building a space located in the midst of the offices of the Bureau of Customs and planned with the Bureau's written approval (R., exhibit 4, p. 163).

The unopened bottles are transferred from the bonded truckers to a screened portion of this approved space. A passenger about to board a foreign-bound plane may present at this space a certificate showing his destination and a boarding card indicating imminent departure. He can then purchase up to two bottles, but is given only a receipt. No bottle is delivered to him. Forms required by the Bureau of Customs are made out; and, in accordance with them, the unopened bottles are immediately passed by the plaintiff in sealed cartons to the purser of the foreign-bound plane in which they are stored by the purser in accordance with Customs-required forms; and, still unopened, they are delivered to the passenger only after he has disembarked at the foreign landing field.

The plaintiff's records, bookkeeping and inventory are constantly inspected by the Bureau of Customs.

Thus these bottles, each constituting an original package for export, have come from outside New York and moved unopened and under escort of the Bureau of Customs in this continuous stream of foreign commerce through New York to be opened only on foreign soil.

For copies of the forms required by the Bureau of Customs and used by the plaintiff, see Exs. 4 and 9 to 14 inclusive, R. 162, 179-189; and Point IV, p. 32, *post*.

No diversion of these bottles into, or consumption of their contents in, the State of New York is claimed, pleaded or proven.

No charge or accusation by the Bureau of Customs of any violation or unlawful act by the plaintiff at any time is claimed, pleaded or proven.

No claim that New York officials have ever complained to the federal officials about the plaintiff or asked a change in the federal regulations or forms, has been or is made.

No charge is or could be made that this export procedure, based on the tax-free differential and conducted by the Bureau of Customs, does not promote the national purposes expressed as follows in the Title of the Tariff Act of 1930 (as amended):

> "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes."

On April 15, 1958, the United States Treasury Department, Bureau of Customs, certified in writing to the plaintiff that "we" regard the plaintiff's procedure (being as above set forth) as "an exportation of merchandise within the meaning of Section 311 of the Tariff Act"; and that the procedure "*is approved*" (R. 12, 13).

In addition to this official approval, the Treasury Department, Bureau of Customs, has continuously manifested its approval and cooperation and its use of the plaintiff's business in furtherance of the aforesaid national interests as to exports and foreign commerce, by formal approval of the plan of the plaintiff's premises in the Arrivals Building (R., Ex. 4, p. 163); by continuous requirement of procedure by the plaintiff in accordance with all the foregoing Bureau of Customs forms; and by its constant inspection of the plaintiff's records and inventory.

The defendants' answer herein asks only that "the complaint herein be dismissed" (R. 65); and its instant brief asks, not a new trial, but only for judgment dismissing the complaint "on the merits" (p. 37).

The gist of the opinion of the court below is in its closing sentences (R. 208):

> "The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do."

The Questions Presented

Since we cannot agree with the defendants' statement of the "Questions" on this appeal, we present the following:

(1) Is the opening claim in the appellants' brief sound, to wit (p. 11) that "Appellee's liquor operations are clearly encompassed by the language of New York's Alcoholic Beverage Control Law"?

(2) Assuming, *arguendo* only, that the New York State Alcoholic Beverage Control Law is by its terms applicable, does the State of New York have the constitutional power to veto and terminate the Federal Government's sanction and use of, and its cooperation with, the plaintiff's procedures in the exercise of its constitutional powers and policies over exports and foreign commerce in wines and liquors contained in bottles, moving for export in bond, tax-free and unopened, from bonded warehouses outside New York through that state under escort by the Bureau of Customs to foreign-bound planes for delivery

on foreign soil still unopened to the prospective consumer there and never diverted into the common mass of property within the State?

(3) Was the Twenty-first Amendment intended to give such supremacy over the Foreign Commerce and Export-Import Clauses of the United States Constitution as to enable a coastal state to bar by its local law the incidental use of its soil for the export of unopened bottles of wines and liquors brought under supervision of the Bureau of Customs from bonded warehouses outside the state and exempted from taxation in order to encourage the industries of the United States, to protect American labor, to protect the American traveler from paying higher prices abroad, and to promote a favorable balance of trade?

(4) Is not the purpose of the Twenty-first Amendment that of protecting the individual state from the interjecting from without into its domestic trade of wines and liquors contrary to its local law for the regulation and consuming of alcoholic beverages?

(5) Is not the issue here concluded by the decisions of the courts of New York that the local law does not have supremacy over the national statutes, regulations and policy in the export of and foreign commerce in wines and liquors while still in the original package?

POINT I

The appellants' opening contention that the New York Alcoholic Beverage Control Law (Ch. 3-B of the Consolidated Laws) is applicable by its terms to the particular operation conducted by the plaintiff in foreign commerce under authorization by the Federal Government, is mistaken.

(1) The appellants start their brief (p. 11) by asking this Court to hold that the plaintiff's operation is "clearly encompassed by the language of New York's Alcoholic Beverage Control Law".

Their argument predicates its desired conclusion, and, we submit, is not only unsupported by the text of the Law but is contradicted by it.

By letter dated April 22, 1960, the State Liquor Board inquired of the State Attorney General concerning the plaintiff's operation "what is the appropriate license therefor" required by the State Alcoholic Law (R. Ex. 1, p. 158).

And by a further letter dated May 9, 1960, the Board informed the Attorney General that "this office takes the position that the Legislature has not provided any appropriate license therefor" (R. Ex. 2, p. 160).

The Attorney General replied that "there is no provision for a license therefor, and no alcoholic beverages in this State may be sold without a license" (R. 17, 19).

With all deference, from the premise that "there is no provision for a license therefor", the opposite conclusion followed, to wit, that the Legislature did not contemplate intruding on the national power and interests in foreign commerce and export.

(2) The internal content and structure of the New York Alcoholic Law show that it is intended solely to regulate the internal domestic traffic in intoxicating liquor.

Section 2 thereof is quoted in full on page 12 of the appellants' brief. In defining "policy of state and purpose of chapter", it declares that

> "it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law."

The "purpose of fostering and promoting temperance" is appropriate to "consumption and respect for law" "*within the state*" rather than in foreign countries.

The declaration that "the restrictions, regulations and provisions" of the Law are "for the protection, health, welfare and safety of the people of the state", certainly does not encompass bottles in bond coming from bonded warehouses without the State and moving unopened in tax-free foreign commerce to destinations abroad. Such bottles, so moving, can by no possibility affect "the health, welfare and safety of the people of the state".

The declaration of purpose "to regulate and control" liquor traffic "within the state" cannot, by any rational construction, be expanded to include what never becomes part of the common mass of property within the State. These bottles, while passing through New York, are at all times under the escort of the United States Bureau of Customs in bond for tax-free export in order to promote the national purposes served by the Tariff Act. They never reach "the people of the state".

Furthermore, the basic fallacy in the appellants' contention is that, whereas the New York Law was enacted "to regulate and control" "within the state", they are now attempting to stretch the Law beyond regulation and to the point of vetoing what the National Government authorizes in furtherance of its constitutional power over foreign commerce and exports-imports. Nothing in the New York Law reflects such intent in the slightest.

The New York Legislature must be presumed to know the constitutional structure of our nation. If it had intended the extraordinary purpose of erecting a roadblock across the path of foreign commerce and export through the Port of New York, plain words were readily available.

(3) Section 3, subd. 28, of the New York Alcoholic Law provides the following definition:

> "'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell *and shall include the delivery of any alcoholic beverage in the state.*" (Emphasis ours.)

Obviously this definition excludes the plaintiff's operation, for both the Liquor Authority and the Attorney General, in their exchange of letters in 1960, conceded that "delivery is not made within the State" (R. 18, 161).

(4) Section 100, entitled "Alcoholic beverages generally", provides:

> "1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

This language clearly contemplates that the sale forbidden is one for which the statute provides "the *appropriate* license", but which is not obtained. Here the position of the Attorney General in his formal opinion and in his brief here was and is that "there is no provision for a license" (R. 19), and that, in consequence, the plaintiff's operation is totally illegal *per se*, not for not "obtaining the appropriate license," but because the law does "not at present afford any license for this type of transaction" (R. 18).

(5) Furthermore, the New York courts have consistently held that the provisions of the Alcoholic Beverage Control Law were inapplicable to international commerce.

During v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385 (1944);

Rosenblum v. *Frankel*, 279 App. Div. 66, 108 N. Y. S. 2d 6 (1951); reargument and appeal denied 279 App. Div. 1020, 108 N. Y. S. 2d 1020.

In the latter case the court unanimously said (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State (*During* v. *Valente*, 267 App. Div. 383)."

See also *Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 9 N. Y. S. 2d 544, aff'd 281 N. Y. 647, 22 N. E. 2d 480 (1939), aff'd 309 U. S. 414, rehearing denied 699 (1940).

POINT II

The Federal sanction and use of the plaintiff's export business pursuant to the foreign commerce, export-import and supremacy clauses of the United States Constitution are preemptive and exclusive; and they are not subject to veto or annulment by the New York Liquor Authority under the Twenty-first Amendment.

Being at all times unopened and constituting original packages, in bond for export tax-free, and conducted by the United States Bureau of Customs, these bottles were never diverted into the common mass of property in the State of New York.

As to the facts, the State Liquor Authority's letter of May 9, 1960, to the State Attorney General correctly described the plaintiff's business as (R. Ex. 2; 160-1):

> "traffic in alcoholic beverages having a situs actually or constructively without the State and not intended for use or delivery within the State."

And the State Attorney General's opinion of June 30, 1960, in reply, conceded that "*the facts are*" (R. 17):

> "A portion of the leased space will be used for storage and display of the liquor (purchased by the corporation from suppliers from stock held by the suppliers in bond) and will remain under bond and under supervision of the Bureau of Customs at all times until delivery to the airplane. The liquor is to be shipped by the lessee from the United States on the plane on which the passenger departs, but is not to be delivered to the passenger until he reaches his foreign destination. Shipment is to be on documents approved for

export by the Federal Government. The United States Bureau of Customs has indicated that it treats this transaction as an export within the meaning of §311 of the Tariff Act of 1930."

And to the same purport, and after an elaborate, and (as far as we can see) an uncontradicted description of the plaintiff's business and of the federal sanction, supervision and control thereof, the opinion below thus concluded its findings of fact (R. 203-4):

> "But we are not here concerned with shipments into New York for 'delivery or use therein.' While the liquor sold by plaintiff passes through New York State and payment for it is made there, it is neither finally delivered nor used until the passenger purchaser arrives at his foreign destination."

And again (R. 208):

> "From the time the liquor enters the state until its departure, it is constantly subject to supervision and control by officials of the United States Bureau of Customs. Plaintiff's records and inventory are always open to inspection by Customs officials, and such inspections have often taken place."

A

The defendants now base themselves on section 2 of the Twenty-first Amendment which took effect December 5, 1933.

It reads:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The limitations of this careful phraseology are obvious. "The transportation or importation" must be "*into*" a state for a purpose,—namely "*for* delivery or use *therein*, in violation of the laws *thereof*".

The phraseology is antithetical to transportation *through* the state in unbroken package for export and for opening and consumption abroad.

The thrust of the Amendment is in its quadruple use of words directed at internal domestic commerce in wines and liquors,—"into", "for", "therein", and "thereof".

The words "transportation *into*" import the state of ultimate destination, and not the passing through an intervening state. *United States* v. *Gudger*, 249 U. S. 373.

Foreign commerce is vitally distinct from interstate or intrastate commerce in its character, governmental relationship and integration in the national economy. It concerns the relation of the United States to the rest of the world.

Doubtless the introduction into the internal economy of a state of wines and liquors no longer in their original package would be within the ambit of the Twenty-first Amendment whether such introduction was from another state or from abroad. It would then have entered the common mass of commercial property within the State and thereupon become subject to local police power.

But here the original package began without the state and ended without the state, and was at all times in bond for export only and under escort and supervision by the Bureau of Customs for export. The foreign commerce went out from the state, not "into" it. For the full procedure see Point IV, p. 32, *post*.

B

No diversion into New York is pleaded or proven. Any attempt to prove it was expressly disclaimed.

The State Attorney General's opinion of June 30, 1960, which necessitated this suit, did not charge or predicate either diversion or violation of the Federal law. On the contrary, it expressly recognized the federal sanction and approval, and the plaintiff's complete conformity therewith (R. 17).

As factually found by the court below (R. 208):

> "In fact, the Liquor Authority has neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York."

In opening his case to the court below Mr. Galt, the Assistant Attorney General, disclaimed any attempt to prove diversion or to accuse the federal officials of illegality or laxity. We quote (R. 84):

> "Judge Bonsal: Mr. Galt, your point is, is it, that the Federal Government is not doing its job? Certainly the purpose of those regulations is to see that bonded liquor does not find its way to buyers in the State of New York. What you are really saying is, is it, that the Federal Government is not doing its job in seeing that this bonded liquor does not get to New York purchasers?
>
> Mr. Galt: I am not accusing the Federal Government [fol. 121] of anything. It would be unbecoming, and in no sense am I here to try the Federal Government. • • •
>
> Unlike Mr. Tuttle's suggestions to me, or possibly in his reply brief, *we feel not bound in the slightest to offer any proof that there is diversion.*" (Emphasis ours.)

C

An unbroken line of federal and state decisions (including New York) negative the claimed application of the Twenty-first Amendment to facts like the present.

Here we are not concerned with broad generalizations, or academic discussions about the Twenty-first Amendment.

In the instant case concern is solely with the facts of this particular case, and with the contention of the defendants at the conclusion of their brief (p. 37) that, on those facts and because of the Twenty-first Amendment, they should have judgment dismissing the complaint "on the merits".

Except for the findings of fact, much of the unanimous opinion below is devoted to an exhaustive analysis of the Twenty-first Amendment, of the pertinent judicial decisions and of the reasons for the Amendment's inapplicability to the instant case (R. 201-8).

We turn to the decisions, some of which deal with the Commerce Clause and some with the Export-Import Clause. Exercise by Congress of power under either or both Clauses is "a regulation of foreign commerce". (*McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 428.)

Both Clauses are of critical importance here, for both predicate the sovereignty of the nation over "exports". What is at stake here, legal terminology aside, is whether a coastal state shall be able by local legislation to bar the nation from authorizing and conducting for *tax-free export* across that state's territory wines and liquors in bond and in their unopened and original packages via foreign-bound planes for unloading abroad still unopened.

Neither the Attorney General's opinion, the Liquor Authority's answer, nor its case at the trial pretends, or could

pretend, that New York has been adversely affected in the slightest by this federally sanctioned flow of wines and liquors from without the State's borders into foreign-bound aeroplanes at this International Airport.

The Tariff Act is both by its Title and by its content an exercise of constitutional power over foreign commerce and export-imports. (See p. 4, *supra*.)

Where, for promotion of foreign trade, Congress has exempted an export from a federal tax otherwise applicable, any attempt by a state, directly or indirectly, to render that exemption and purpose ineffectual, either by blocking enjoyment of the exemption, or by blocking the export itself, is a violation of both the Foreign Commerce and the Export-Import Clauses. There is nothing in the Twenty-first Amendment to the contrary.

The so-called "original package doctrine" which continues character as an export or import as long as the original package moving as an export or import remains unbroken, is basic, of universal acceptance, and deemed as applicable to liquor as to other merchandise.

> *Brown* v. *State of Maryland*, 12 Wheat. 419;
> *Low v. Austin*, 13 Wall. 29;
> *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652.

The right to engage in foreign commerce "is not the gift of a state", and hence "a state cannot regulate it or restrain it". (*Hood & Sons* v. *DuMond*, 336 U. S. 525, 535, 537-8.)

Hence we have at stake here a national concern "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". (*Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Penn-*

sylvania v. *Nelson*, 350 U. S. 497, 504; *Hines* v. *Davidowitz*, 312 U. S. 52, 62-69.)

This exclusive power over foreign commerce is part of the larger and indispensable constitutional principle which requires "the supremacy of the national power in the general field of foreign affairs", lest we be a mere league of states rather than a nation. (*Hines* v. *Davidowitz*, 312 U. S. 52, 62-64.)

The purpose of the Twenty-first Amendment was not to subvert and reverse this constitutional principle essential to the viability of our nation in foreign commerce and affairs, but to prevent the so-called "wet states" from using interstate commerce to interfere in the internal affairs of the "dry states" respecting the control of intoxicating liquor, and *vice versa*.

Senator Blaine had charge in the Senate of the Joint Resolution for the adoption of the Twenty-first Amendment. In the course of his advocacy of it on the floor, he said (Congressional Record, February 15, 1933, pp. 4139, 4140):

> "Mr. President, during the course of my brief remarks I will undertake to set forth the committee's position on that question. * * *
>
> I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors."

We assume that the Liquor Authority would not venture to argue that the State could lawfully condition foreign

commerce on a license from itself in addition to the license from the National Government.

Yet that is precisely what the Attorney General's opinion attempts *by indirection* (R. 17). It holds that New York can frustrate the national license and program for foreign commerce by declaring illegal what the State itself does not license and (according to the opinion) under its statute cannot license (R. 19).

Federal Decisions

In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, the appellant, an importer and distributor of alcoholic beverages, having been denied by the Secretary of the Treasury the right to import its product into the United States, sued for a declaratory judgment that the Federal Alcohol Administration Act was unconstitutional because of the Twenty-first Amendment. This Court held to the contrary, saying (pp. 172-3):

> "Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention."

In *C. J. Tower & Sons* v. *United States*, 135 F. Supp. 874, the United States Customs Court, Third Division, held that the holding of the courts, after ratification of the Twenty-first Amendment, that violations of the National Prohibition Act could no longer be prosecuted, was inap-

plicable to "a statute enacted under the federal power to regulate foreign commerce." The Court said (p. 881):

> "Said 21st amendment did not destroy the power of Congress to regulate foreign commerce, and, irrespective of that amendment, Congress retains its constitutional right to impose conditions upon the importation of intoxicating liquor into the United States. *William Jameson & Co., Inc.*, v. *Morgenthau*, D. C., 25 F. Supp. 771."

In *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, this Court held that, notwithstanding the Twenty-first Amendment, California had no power to seize alcoholic beverages being transported across its territory from a point outside the state under consignment to customers in Yosemite National Park which was under the general jurisdiction of the United States. The California statute declared that "alcoholic beverages shall be brought into this State from without this State for delivery or use within the State only when such alcoholic beverages are consigned" to a person or premises "licensed under this act". "The penalty was forfeiture. This Court said (p. 538) "there was no transportation into California 'for delivery or use therein'" within the meaning of the Twenty-first Amendment; and further said (pp. 536-8):

> "The State makes the point that §2 of the XXI Amendment gives it the right to regulate the importation of intoxicating liquors. * * * The lower court was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem * * *, it did not increase its jurisdiction.' With this conclusion, we agree. * * * Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable."

In *Carter v. Virginia*, 321 U. S. 131 (1944), this Court, while upholding the power of a state through which alcoholic liquor was in transit to adopt reasonable police measures to prevent diversion in transit, said (p. 137):

> "It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the (Twenty-first) Amendment. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 535."

In *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383 (1944), affirming 137 F. 2d 274, and 48 F. Supp. 594, intoxicating liquors in transit from a consignor in Illinois to a consignee in the Fort Sill Military Reservation in Oklahoma were seized in Oklahoma by state officers on the charge of violating an Oklahoma statute which made it unlawful "to import, bring, transport, or cause to be brought or transported *into* the state intoxicating liquor without a permit". (Emphasis ours.)

This Court held that the general power to govern the Military Reservation was in the United States; and that in consequence, notwithstanding the Twenty-first Amendment, the Oklahoma statute was not violated by the through shipment across that State's territory.

In the U. S. Court of Appeals below, 137 F. 2d 274, the argument that the Twenty-first Amendment gave the Oklahoma law applicability was rejected, the court saying (p. 276):

> "There was no transportation into Oklahoma for delivery or use therein."

The holding of the District Court, 48 F. Supp. 594, 601-2, was similarly reasoned, and *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, *supra*, was relied on.

In *United States* v. *Gudger*, 249 U. S. 373 (1919), this Court held (to quote the headnote):

> "The Reed Amendment, prohibiting the transporting of liquor in interstate commerce 'into' any State the laws of which prohibit its manufacture, etc., does not preclude its transportation through such a State to another."

In *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941), the State of Arkansas required a permit for a nominal fee for the transportation through the State of intoxicating liquor. The Court found that the sole object was to identify the transporter and thus enable local officials to prevent diversion the more easily. The Court was careful to point out the distinction between such a reasonable measure and total prohibition as attempted in the present case. It said (p. 393):

> "It does not forbid the traffic in liquor, nor does it impede it more than is reasonably necessary to inform the local authorities who is to effect the transportation through the state, and to afford opportunity for them to police it."

In the instant case the court below has well pointed out (R. 202) that this *Duckworth* case makes against the right of a state under the Twenty-first Amendment to enforce total forbiddance or "elimination" where the liquor merely passes through.

In *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, this Court made certain declarations of principle which, although the case involved imported petroleum rather than alcoholic liquor, are directly pertinent here. There, acting under the Tariff and Revenue Acts, Congress had exempted

from import duty crude petroleum imported in bond into the Port of New York, to be converted in a bonded warehouse and withdrawn duty free for sales for fuel to vessels engaged in foreign trade. New York City sought to impose on such sales its sale tax law. This Court, affirming the State Court of Appeals (281 N. Y. 647; 22 N. E. 2d 480), overruled the City's claim, and said (pp. 423, 425-6):

> "For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation. * * *
>
> From the time of importation until the moment when the bunker 'C' oil is laden on vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and property within the state, and is subject to the supervision and control of federal customs officers. It cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce and it cannot lawfully be diverted from such destination and use and cannot, after delivery to the vessel, be landed in the United States. Throughout, the oil is subject to the obligation of respondent's bonds that it shall remain under such supervision and control and shall not be diverted from its ultimate designation as ships' stores."

So likewise in the instant case. The liquor remains at all times until actual export under the obligation of the bond furnished at the bonded warehouse (R. 17, 116, 118, 159).

In *National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, cert. den. 352 U. S. 928 (1956), the plaintiff had paid under protest a personal property tax levied by the City and County of San Francisco on intoxicating liquor held by it in original packages in bonded warehouses in San Francisco. From the warehouses the liquor was to move under bond for delivery to customers and destinations in foreign countries or for consumption on the high seas. All the courts upheld plaintiff's claim to restoration of the tax paid under protest. The California Appellate Court held that, in moving in its original packages into the bonded warehouses and thence, upon sale for consumption outside the United States via foreign-bound vessels, the liquor never lost its character and status as foreign commerce and outside the mass of common property in the state, and that it could not be subjected to any state tax while in California. This Court denied certiorari, *supra*.

A case identical with the present in its facts and in its question for decision is *Ammex Warehouse Co., et al.* v. *Department of Alcoholic Beverage Control for the State of California, et al.*, 224 F. Supp. 546, decided last December by a three-judge District Court (Jertberg, C. J., and Yankwich and Carter, D. JJ.) sitting in the Southern District of California.

The court cited the instant *Idlewild* case as "deciding a like problem", and developed its own reasoning to the same result (p. 555).

It also cited *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, as teaching that "goods 'in bond' do not become a part of the common mass of property in a state", and that, while they so remain, the merchandise has not "lost its distinc-

tive character as an import and its constitutional immunity as such from state taxation" (p. 555).

The court concluded (p. 555):

> "In our case the goods are 'in bond' or under control of U. S. Customs until the movement of export. *They never become part of the common mass of goods in the State.*" (Emphasis ours.)

State Decisions

In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385, the New York Appellate Division of the Supreme Court overruled the contention of the New York State Liquor Authority that the Twenty-first Amendment put under its jurisdiction and subjected to N. Y. Alcoholic Beverage Control Law Portuguese Brandy imported into the United States and stored in the Free Trade Zone of the Port of New York, located in New York City and not ceded to the Federal government. The plaintiff sued for his commissions in effecting for the defendant a sale of the brandy so stored. The Court sustained the plaintiff and said (p. 386):

> "By its terms the Amendment grants power to a State to regulate traffic in liquor only to the extent that such liquor is transported or imported for delivery or use within such State. The complaint contains no allegation from which it could be inferred that the sale involved the importation of the liquor into the State of New York within the meaning of the Amendment."

The Court further said (p. 385):

> "It is obvious that this zone is created under the power of Congress to regulate commerce with foreign countries. This power is exclusive and plenary."

The Court further said (p. 386):

> "The Alcoholic Beverage Control Law contains detailed regulations affecting all persons involved in the purchase and sale of liquor. If applicable at all it not only affects solicitors such as the plaintiff but likewise applies to the foreign owners of this brandy and others engaged in the transaction. The imposition of these complicated regulations upon foreign commerce in liquor within trade zones would not only interfere with the exclusive control of Congress over this commerce but would seriously impair, if not defeat, the purpose for which these zones were established."

This ruling was followed by the same Court in *Rosenblum* v. *Frankel*, 279 App. Div. (1st Dept.) 66, 108 N. Y. S. 2d 6, where the New York Liquor Authority sought jurisdiction over industrial alcohol imported into New York from the Virgin Islands for sale in part outside the State. Said the Court (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State (*During* v. *Valente*, 267 App. Div. 383)."

In *Parrott & Co.* v. *City and County of San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881, the court held, concerning the Twenty-first Amendment and foreign commerce (280 P. 2d at p. 883):

> "The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which, under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned."

And the court further said (p. 885):

> "The obvious purpose of the Twenty-first Amendment was to preserve the intrastate jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry'. (See LV Yale Law Journal, p. 815.) That amendment raised to constitutional dignity the right of each state to control its own liquor traffic, but there is not the slightest reason to believe that it was intended to modify the traditional federal-state relationship in connection with foreign imported liquor."

In the instant case the wines and liquors were always in their original packages, namely bottles which remained sealed from their origin and commitment for export in the bonded warehouse until the ultimate point of delivery abroad.

In *State* v. *Board of Review, City of Milwaukee*, 15 Wis. 2d 330, 112 N. W. 2d 914, liquor had been imported into Wisconsin by a state wholesaler but not sold or consigned. It remained in original unopened cases or containers. The Supreme Court of Wisconsin held that, notwithstanding the Twenty-first Amendment, such liquor was exempt from personal property taxes while so held. The court said (p. 917):

> "It is suggested by appellants that the Twenty-first amendment to the United States constitution permits taxation in this case. The argument is made that since that amendment has given the state control over importation of liquor for use and sale solely within the state, the state can tax the liquor. This ignores the fact that under the authorities cited above the protection afforded imported liquor here has not ceased. The liquors are still imports and are protected by the import-export clause. The Twenty-first amendment is

not inconsistent with the import-export clause and does not repeal it in so far as intoxicating liquors are concerned. Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 332, 280 P. 2d 881."

Under date of July 12, 1935, *Hon. John J. Bennett, Jr.*, Attorney General of the State of New York, rendered to the State Liquor Authority an opinion (N. Y. Attorney General's Report, 1935, p. 139). The headnote to that opinion reads (p. 139):

"A license under the Alcoholic Beverage Control Law may not be required of an importer of liquors; vendors of warehouse receipts representing imported liquors not yet withdrawn for consumption from customs bonded warehouses may not be required to be licensed. License may be required of importer who himself withdraws the liquor for sale, consumption or delivery."

In the course of that opinion the Attorney General said (p. 139):

"A different situation appears to exist with regard to imported liquors, since the regulation of commerce with foreign nations is definitely within the exclusive control and jurisdiction of the Federal government (Constitution of the United States, Article I, Section 8), and no measure of such control appears to have been relinquished by the Federal government to the various States."

And the Attorney General further said (p. 140):

"It seems that imported liquors, subject to duty, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner, importer or consignee. Such merchandise may remain in bonded warehouse not to exceed three years

from the date of importation and may, at any time within three years, be withdrawn for consumption upon the payment of the duties and charges accruing thereon.

"It would seem, therefore, that imported liquors in customs bonded warehouses must be considered to be still in foreign commerce and cannot be deemed to have become part of the general mass of property within the State, so as to be subject to the control of the State."

We attach as Appendix A a copy of a ruling by the Massachusetts Alcoholic Beverages Control Commission, dated May 16, 1962, made as to an export business identical with that of this plaintiff and constituting the direct opposite of the ruling by the New York Attorney General and the New York Liquor Authority here involved (A-1).

We also attach as Appendices B and C a like ruling, also on identical facts, by the Attorney General of Arizona (A-4, A-7).

We also attach as Appendix D a copy of a final judgment of the 53rd District Court of Travis County, Texas, entered on May 21, 1962, permanently enjoining the Texas Liquor Control Board from interfering with the federally sanctioned business of the plaintiff in that case,—a business identical, as shown by the recitals in that judgment, with the business of the plaintiff in the present case (A-11).

POINT III

The decisions cited in the appellants' brief are without parallel in point of fact, principle or consequence.

The appellants' brief epitomizes their case as follows (p. 9):

> "Since then, this Court has consistently held that §2 of that Amendment shields state legislation affecting traffic in intoxicating liquors from restriction or limitation by the Commerce Clause, Export-Import Clause, or other provisions of the Constitution. See, *e.g.*, *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936); *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Company* v. *Liquor Control Commission*, 305 U. S. 391 (1939); *Finch & Company* v. *McKittrick*, 305 U. S. 395 (1939); *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Gordon* v. *Texas*, 355 U. S. 369 (1958); *California* v. *Washington*, 358 U. S. 63 (1958)."

All the decisions thus cited dealt with *interstate* traffic.

Not one of the decisions thus cited contained any such unlimited and didactic generalization as above. On the contrary, some of them expressly reject it.

Not one of them presented the slightest factual resemblance to the instant case.

Not one of them presented in its facts or for decision an exercise of the federal constitutional powers over *foreign* commerce or export-import.

Not one of them presented an instance of liquor in original package, in bond for export tax-free for the national purposes subserved by the Tariff Act, and conducted by

the U. S. Bureau of Customs from place of origin outside the state to destination abroad.

On the contrary, all the decisions cited dealt with one or more of the following classifications:

(1) The right of a state, whether under the Commerce Clause or under the Twenty-first Amendment, to enact reasonable traffic regulations to protect itself against diversion of the liquor while in transit through its territory from one state to another.

Within this class are such cases as *Gordon* v. *Texas*, 355 U. S. 369 (1958), discussed by the court below (R. 207); *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1938); *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), discussed by the court below (R. 205-7).

(2) Transportation from one state into another for absorption there into the common mass of property. Such was *State Board* v. *Young's Market Co.*, 299 U. S. 59 (1936). California had imposed a license fee on importers into California of foreign beer for wholesaling in that State—namely for "delivery or use" therein.

Moreover, this Court was careful to make clear (p. 64) that its decision was confined to the special facts before it and was not a "generalization" as to the Twenty-first Amendment.

(3) Retaliatory legislation whereby a state forbade importation of liquor from a state which discriminated against the former's manufactured liquor. Such were *Joseph S. Finch Co.* v. *McKittrick*, 305 U. S. 395 (1939); and *California* v. *Washington*, 358 U. S. 64 (1958).

The appellants' principal reliance seems to be on the *Ziffrin* case, 308 U. S. 132, *supra*.

The facts there are wholly alien to those here.

There the plaintiff was engaged as a motor carrier in carrying intoxicating-liquor from a distillery in Kentucky to consignees in Chicago. It had permission under the Federal Motor Carrier Act; but it had not complied with the requirements of the Kentucky Alcoholic Beverage Control Law for a Kentucky license to conduct such transportation in Kentucky. This Court held that, since the liquor was manufactured in Kentucky and the plaintiff received it in Kentucky for transportation across Kentucky, it could not lawfully act as a carrier thereof *in Kentucky*; and that, under the Twenty-first Amendment, Kentucky's statutory requirement of a license controlled.

Undoubtedly, as recognized by the court below in the instant case, *Ziffrin* does contain some broad expressions not at all necessary to its decision (R. 205-6), since all that was involved there was traffic in Kentucky in liquor manufactured in Kentucky. We refer to the comments thereon below (R. 205-6). Obviously, there is no parallel in point of fact or legal principle with the instant case.

We refer also to the comments in the very recent case of *Ammex Warehouse Co. v. Department*, 224 F. Supp. 546, 554, *supra*, p. 23, on the same broad language in the *Ziffrin* case.

POINT IV

The joint procedures of the plaintiff and the Bureau of Customs under the latter's regulations and prescribed forms, constitute an undeviating stream of in-bond foreign commerce from bonded warehouses outside New York into non-stop planes foreign-bound from the Idlewild International Airport.

(1) Indeed, the Liquor Authority's letter of April 22, 1960, to the Attorney General conceded (Ex. 1; R. 159):

> "*Shipment will be made on documents approved for export by the federal government* and the airline will make the delivery to the passenger at the foreign destination." (Emphasis ours.)

The description by the plaintiff's president (Mr. Giliotti) of this stream of foreign commerce and the procedures which channel it abroad under the supervision of the Customs Bureau every step of the way, begins at page 93 of the Record.

This description is uncontradicted. It covers a period of more than two and a half years, during which there has been no change or call for change and no violation.

(2) Section 66 of Title 19 U. S. C. authorizes the Secretary of the Treasury to prescribe "forms" and to make "rules and regulations" as to imports, duties and warehousing, and to

> "give such directions to Collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law."

Sections 1308 and 1311 of Title 19 U. S. C. authorize the Secretary of the Treasury to prescribe rules and regulations for the bonded warehousing and for the bonded exporting of domestic liquors and of imported liquors "under bond for their exportation within one year from the date of their importation".

Obviously, the Treasury Department's letter of April 15, 1958, to the Collector of Customs for New York (Ex. 3) was such a "direction" and "rule" for promoting and implementing the purposes of the Tariff Act of 1930 (R. 12, 162).

Section 1624 of Title 19 U. S. C. makes this further provision:

> "In addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter."

Section 6 of Title 19 U. S. C. authorizes the Secretary of the Treasury to appoint "inspectors and such other customs officers" "as he shall deem necessary", and to "prescribe their designations and duties."

Title 19 of the Code of Federal Regulations (C. F. R.) provides in Part 1, §1.1, for the establishment of 46 customs collection districts in the United States, one of which is the area in which is located the International Airport at Idlewild.

Subdivision (b) of §1.1 thereof provides that a customs officer assigned to any such district shall have

> "authority to inspect entries of merchandise, to collect duties and to enforce the various provisions of the customs and navigation laws."

Throughout the period here involved Section 1646a of Title 19 U. S. C., entitled "Supervision by customs officers," provided:

> "Wherever in this chapter any action or thing is required to be done or maintained under the supervision of customs officers, such supervision may be direct and continuous or by occasional verification as may be required by regulations of the Secretary of the Treasury, or, in the absence of such regulations for a particular case, as the principal customs officer concerned shall direct."

Title 19, Part 23, §35 (C. F. R.), also authorizes "the customs field officer" to determine when "less intensive supervision will assure proper enforcement of the law and protection of the revenue, by such occasional verification as such officer shall direct."

Obviously, these authorizations were not exhausted by any single "direction", "rule" or "regulation". New ones could issue from time to time as new occasions, procedures, promotions and policies for carrying out the continuing purposes of the Tariff Act of 1930 came forward.

The function of the Secretary of the Treasury in providing constant administration for the broad purposes of the Tariff Act of 1930 was as continuous and adaptive as the purposes themselves.

His functioning did not die with its first exercise.

(3) Pursuant to these authorizations the Customs Bureau designated for the plantiff's operation a space on the second floor of the Arrivals Building at Idlewild in the very center of the Bureau's customs controls and directly across

the hall from the Chief Collector of Customs at Idlewild. "They call it the goldfish bowl" (Ex. 4, R. 96-8, 155, 163).

Pursuant to the same requirements, the plaintiff thereupon submitted a floor and elevation plan which is in evidence as Exhibit 4, and which, together with the ensuing construction, has had the express and constant approval of the Bureau (*id.*).

This approved space consists of an enclosed room with four walls running to the ceiling and enterable only by a single door. This enclosed room serves as a warehousing space for the bottles awaiting export by foreign-bound planes. The front of the approved space is a counter where orders are taken from passengers on such planes and the records for inspection and checking by the Customs Bureau are made and kept. Only dummy bottles are displayed in this front space (R. 99, 111).

(4) The plaintiff initiates its operation by placing orders by letter or telephone with out-of-state suppliers having out-of-state bonded warehouses (R. 105). Withdrawal therefrom is on "Customs Form 7512 Treasury Department" "Form Approved Budget Bureau No. 48-R212.5" (Exhibit 9) (R. 106-6, 179). It is entitled

> "Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit: Bureau of Customs."

On this Form there is recorded the withdrawal's entry number and "final foreign destination". It recites the goods as "to be shipped in bond via Bonded Cartmen", and as "consigned to Collector of customs at ——."

Form 7512 also requires the Government's inspector or warehouse officer to sign a "certificate of lading for trans-

portation in bond and/or lading for exportation for ——— Port"; and that

> "the Within-Described Goods were Delivered to the Carrier named above, for delivery to the Collector of Customs at destination sealed with Customs seals."

Form 7512 also requires that there also be filled in the name of the trucker or cartman, the name of the "inspector" of delivery to the trucker, and various data as to delivery and the intended destination, and export. The Form also requires the trucker to sign the following certificate:

> "Received from the collector of customs of above district the merchandise described in this manifest for transportation and delivery into the custody of the customs officers at the port named above, all packages in apparent good order except as noted hereon."

On the back of Form 7512 there is a blank form of "Inspector's Report of Discharge at Destination" to be filled out, certified and signed by the "Inspector" there.

This Form 7512 is, by carbon paper, made out in quintuplet to be used in accordance with the instructions on the reverse side thereof, special reference being made to Part 18 of Customs Regulations (Title 19 C. F. R.). Reference to Parts 18 and 19 (Title 19) of these Regulations shows that this Form 7512 is a basic Treasury Department Form which is used in connection with all withdrawals from bonded warehouses for purposes of export whether the wines or liquors are of domestic or foreign origin. See especially §§18.2, 18.3, 18.10, 18.17, 18.19, 18.20, 18.22, 18.26 and 18.30.

Of the five copies of Form 7512, one was immediately mailed to the Customs Office at Idlewild Airport; a second was sent to the plaintiff; a third was delivered to the trucker in a sealed envelope to accompany the shipment and ultimately to be delivered to Customs at designation (R. 101-3).

Mr. Galt stated: "As a basic form used in the transporfation of bonded liquor, I have no objection to it". It was "admitted (in evidence) as a form used in the transportation of bonded liquor " (R. 103).

(5) The bonded trucker's ensuing Form is Exhibit 10 (R. 103-8, 180). It carries the entry number designated on the aforesaid Form 7512, *and recites as consignee and destination*:

"COLL OF CUSTOMS
IDLEWILD BON VOYAGE LOR CORP
RM 2123 INTL ARRIVAL BLDG
NY INTL AIRPORT JAMAICA 30 NY"

The trucker is customs bonded; and the truck doors are firmed with an approved seal which "can only (be) broken upon the arrival of the liquor at Idlewild and cannot be opened unless the seal is broken" (R. 103-5). See Title 19, U. S. C., sections 1551 *et seq.*

On reaching "the main Customs area at Idlewild" Arrival Building, the trucker delivers to the plaintiff the sealed copy of Form 7512 and the carbon copy of this trucking Form. He retains the original which is signed by the plaintiff only after the shipment is in the plaintiff's approved area and has there been checked for accuracy. If a discrepancy is found, the plaintiff notifies the Customs Inspector (R. 105-8).

(6) The data on the duplicate of the trucker's Form retained by the plaintiff and the data on its copy of aforesaid Form 7512 are then immediately transferred to and entered upon Form Exhibit 11 (R. 182), which also is in duplicate and is known as "record of usage" (R. 108-111).

This Form recites the goods as "Bonded Liquor", and is ruled in such wise as to show in detail the receipt from the trucker and the subsequent delivery to the airline. It also shows the passenger's name, the "number to be accounted for", and the "balance" (if any) remaining. At the bottom of the sheet the plaintiff is required to fill in the date and to sign the following certificate:

> "I hereby certify that the above described tax-free liquor was withdrawn in customs custody and was laden for delivery to passengers on aircraft as set forth above and that the records of the company show that this merchandise was laden on a/c leaving the united states."

The original and the duplicate of Exhibit 11 are left in the plantiff's customs-approved area until the quantity of liquor designated by the entry number as received from the bonded trucker is exhausted. They are then delivered to the Customs Inspector for checking, along with the aforesaid other Forms which have been retained by the plaintiff for the purposes of the Customs Bureau. After checking, the Inspector stamps the copies, retains the original, and returns the copy to the plaintiff's office to become, together with the copies of the other Forms, part of its permanent records (R. 109-112).

(7) The next Form (Exhibit 12, R. 184) is the "Customer's Invoice" which is made out in quadruplet by car-

bon paper. It records the "Airline", the "Flight No.", "Ecy/Tourist" or "First Class", and the "Seat" number (R. 113-6). At the bottom is the following:

"IMPORTANT

1. All liquors purchased through this store was sold 'In Bond' and cannot be brought back into the United States under Passenger Allowance accorded in par. 1798 of the U. S. Tariff Act.

2. Merchandise sold is for export only and to be delivered at foreign Port of Debarkation. Please request delivery before leaving airplane.

3. Any claim for non-delivery must be accompanied by this receipt and presented to Idlewild Bon-Voyage Liquor Corp. within 60 days of purchase. No claim will be honored if passenger changes flight without notifying this office 1 hour prior to departure of original booking."

By international reciprocity a similar service is available to persons coming from Europe into the United States (R. 151).

The original copy, signed by the passenger, is given to him. The second copy is gummed to the sealed corrugated container by which delivery is made to the purser on the airplane. The third copy is for Customs, and is kept in the plaintiff's own area for customs inspection, "which they (customs' officers) frequently do". The fourth copy is given to the Port Authority for its accountants; and the fifth is given to the plaintiff's accountants (R. 113-5).

The purchased liquor is then dispatched to the purser of the designated plane 30 minutes before its departure (R. 114).

(8) The next Form (Exhibit 13, R. 186) is the purser's signed certificate "Received for export parcels in good order for delivery at foreign port of debarkation to passengers before leaving aircraft" (R. 117-8).

It is made out in duplicate, and both copies are signed by the plaintiff's man making the delivery and by the purser after he has checked the delivery and before the flight starts. The purser retains one copy and the other is brought back to the plaintiff's office (R. 117-8).

(9) All the foregoing Forms (Exs. 11, 12 and 13) had been submitted to and approved by the Customs (R. 112).

(10) Exhibit 15 is a letter, dated January 10, 1958, by Pan American Airways to the plaintiff, guaranteeing as follows (R. 153-5, 190):

> "Pan American will perform the following functions in order for the Idlewild Bon Voyage Liquor Corporation to satisfy Customs that the liquor consigned to departing international passengers has been duly received on board for subsequent delivery to the passengers.
>
> 1. Thirty minutes prior to the scheduled departure of our flights, the liquor consigned to passengers reserved on the flight will be receipted for at the aircraft by the purser of the flight.
> 2. The liquor will then be stored aboard the aircraft for ultimate distribution to the passengers just prior to the landing of the aircraft at the first foreign country.
> 3. It is understood that the documents signed by the purser of the flight will be such so as to

> permit the Idlewild Bon Voyage Liquor Corp. to conform with Customs export requirements and that no further documentation will be required of Pan American Airways."

Mr. Tuttle then offered to Mr. Galt similar letters from other airlines, but Mr. Galt did not pursue the subject further (R. 155).

(11) Exhibit 14 is the brand label which must be affixed to bottles of domestic wines and liquors before leaving the bonded warehouse. It is headed by the words (R. 120, 189):

> "Bottled for export under supervision of the Government of the United States of America."

(12) These Forms, kept together in the plaintiff's office and the duplicates in possession of the Customs Bureau, constitute a complete and verifiable accounting whereby at all times the customs inspectors "can see that all of the items listed on 7512 have been disposed of in this way" (R. 115).

(13) The bond of the seller to the plaintiff remains in force until he has been notified that export of the bottles withdrawn from the bonded warehouse has been completed. Thus they are at all times "in bond" (R. 116, 118).

To quote Giliotti (R. 116), such notification

> "cancels the bond which he puts up for the liquor, drawing it out from his bonded warehouse, *because we operate under his bond at all times*, either Conner, Lipschutz or Pascal, and until this is proven that all these items are exported, they are liable for the bond. Upon the proof of export, that bond is canceled." (Emphasis ours.)

(14) After all the Forms are completed and assembled as aforesaid in the plaintiff's office, they are then kept by the plaintiff on permanent file "for inspection at any time for Customs inspection, whoever it might be" (R. 118).

Such inspection occurs "many times and continuously". Customs men are "constantly around the vicinity of our operation, either at the area or in the field or on the airplane" (R. 118-120).

In addition to the regular customs inspectors in this customs area, there are the so-called "customs searchers" who are "out at the airport at all times", operate independently, and "search" all the plaintiff's operations at such times as they please (R. 119).

(15) Obviously, the foregoing Forms and the manner in which they are used and ultimately assembled for inspection and check, make a complete record of export from the bonded warehouse to delivery on the foreign-bound plane, and create an accounting device which must at all times balance to a bottle and ultimately show the final export in bond of every bottle which started for export from the bonded warehouse.

They make certain the truth of the following uncontradicted testimony by Giliotti (R. 120):

> "Q. At any time in the period of time plaintiff has been conducting this business, have the Customs people communicated to you any finding of discrepancy in all these records?
>
> Mr. Galt: Objected to as immaterial, irrelevant and incompetent.
>
> Judge Hays: Overruled.
>
> A. None were ever reported to me."

(16) All the plaintiff's operations at the Airport have been conducted in "their (the customs inspectors') place of operation" (R. 132).

They (the inspectors) "are always around". "We have had customs inspectors down at the area when it (the liquor) was unloaded. We have customs inspectors when it was brought into the area. We have had customs inspectors observing our deliveries". "Some could be plain-clothesmen",—the so-called "customs searchers" (R. 118-9, 130-2).

At times an inspector accompanied the liquor from the truck to the plaintiff's office which is directly across the hall from the Chief Collector of Customs (R. 98, 132). At times an inspector was present when the liquor was being put aboard the plane and himself went aboard to check (R. 119, 120). Inspectors have broken open the sealed carton while in transit to the plane (R. 119). In short, they "inspect anything they wanted to" (R. 120).

(17) Obviously, the foregoing statutes, regulations, rules and prescribed forms constitute "a comprehensive scheme" for the accomplishment of the national purposes in the regulation of this foreign commerce and this exportation. (*McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 426-7.)

POINT V

The appellants' effort to supersede the Secretary of the Treasury and the United States Bureau of Customs in interpreting the statutes, regulations and rules under which they have sanctioned and utilized plaintiff's operations in furtherance of the national purposes and policies for foreign commerce, is inadmissible.

Moreover, their brief misinterprets and mistakes the body of federal statutes, regulations and rules on which the federal sanction rests.

(1) The appellants' brief devotes pages 27-33 to contentions that they have standing to contend that the plaintiff does not lawfully have the sanction which the Federal authorities have professed to give it by word and deed.

In other words, they seek to shift the case to a trial of the Federal Government's acts notwithstanding that at the opening of the trial below the Assistant Attorney General conceded that "in no sense am I here to try the Federal Government", and that he had no intention "to offer any proof that there is diversion" (R. 84).

This contention by the appellants is in the nature of an afterthought. Not only did it not appear in the correspondence between the State Liquor Authority and the State Attorney General in 1960, but the contrary was asserted in their respective letters. All the letters predicated that the Federal Government "*treats this transaction* as an export within the meaning of §311 of the Tariff Act of 1930" (R. 18, 159). No challenge to or trial of the Federal Government's position was suggested.

(2) Moreover, the appellants are completely in error in endeavoring to confine authority for federal sanction to §311 of the Tariff Act and they are again in error in their interpretation of that section.

In Point IV, *supra*, we show that this sanction has as its base not only §311 of the Tariff Act but also other statutes and numerous regulations, rules and forms in interpretation and implementation thereof.

The identical attempt to shift the case from the New York statute to the propriety of the Federal Government's interpretation of its own statutes, reguluations and rules was made in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, and was rejected by this Court, which said (pp. 426-427):

> "The provisions of the Revenue Act of 1932, read with those of the Tariff Act of 1930 and with the statutes and regulations which we have mentioned, thus afford a comprehensive scheme for the regulation of the importation of the crude petroleum and of its control while in the course of manufacture in bond into fuel oil and its delivery as ships' stores to vessels in foreign commerce, all calculated to insure the devotion of the manufactured oil exclusively to that purpose.
>
> The statutes and regulations taken together operate as regulations of foreign commerce, as the legislative history shows they were intended to do."

Furthermore, the appellants' contentions were all aired in the cross-examination of the plaintiff's President at the trial in the court below (R. 121, *et seq.*) and were rejected by that court in its findings of fact (R. 193-4, 207-8).

In the Texas instance (Appendix D, p. A-11, *post*), the Texas court granted against the Texas Liquor Control

Board and *on like facts* a "final judgment of injunction" such as we are asking here, citing as authority therefor:

> "The U. S. Tariff Act of 1930, as amended, 19 U. S. Code, §§1301, *et seq.*, including, without intending to limit, the operations to the particular section stated, §§1308, 1311, 1553, 1554, 1555, 1556, 1557, 1558, 1564, 1565, 1585, 1586, 1592, 1594, 1595, 1623 and 1646, respectively, and/or 26 U. S. Code, §§5521, 5522, 5232, 5242, 5243, 5247, and/or all regulations, rules and orders of the Secretary of the Treasury of the United States, the U. S. Bureau of Customs and the U. S. Internal Revenue Service, which are in furtherance of said laws so enacted by the Congress of the United States."

Substantially all these statutes and regulations are pleaded in the complaint. (R. 1-4, 7, 8).

(3) The fact that the Customs Bureau's letter of April 15, 1958 to the plaintiff (Ex. 3) stated that delivery of the liquor to the passenger at the foreign port would be an exportation "within the meaning of section 311", did not exclude its character as also an exportation within the meaning of Section 308 and other sections which constituted integral parts of the common subject matter and objective of the Tariff Act as to exports; or exclude the continuous power of the Treasury Department and the Customs Bureau to adopt additional administrative measures and extend additional authorizations as might from time to time better the effectuation of the policies and purposes of the Act.

(4) The complaint is not confined, as appellants contend, to withdrawals from Class 6 bonded warehouses.

The plaintiff's basic position is pleaded in Par. 4 of its complaint, where it is stated (R. 3):

> "The bonded wines and liquors exported by plaintiff are purchased for such purpose by plaintiff solely from various suppliers while in bond and withdrawn for export only by plaintiff exclusively from Class 6 United States Government bonded manufacturing *and United States Customs bonded warehouses*, where they are located, * * *."

This reference to *both* classes of bonded warehouses is repeated in subsequent allegations of the complaint, which also expressly avers, in accordance with Sections 1308 and 1311 and Form 7512 (Ex. 9), that the liquors "constitute exports from the moment they are placed *in such warehouses*" (4a, 5a).

Title 19, Part 19, Sections 19.1 and 19.2, list eight classes of United States Customs Warehouses,—all bonded and all utilized for foreign commerce.

(5) Furthermore, the appellants' present contentions reflect no more than an effort to claim, *collaterally in this action*, that the Federal Government has misinterpreted its own statutes, forms, rules and regulations, and, although no diversion of liquor has occurred, has not provided adequate police supervision.

There is no claim, much less evidence, that either the Attorney General or the Liquor Authority even asked the Federal Government, the Customs Bureau or the plaintiff for a change in procedures. On the contrary, the claim here is for a judgment which would have the practical effect of voiding altogether both the federal program, all the joint procedures and the plaintiff's sole business integrated

therein, notwithstanding that neither the Federal Government, the Treasury Department nor the Customs Bureau is a party to this action.

We submit that such annulment cannot be accomplished herein *collaterally and by this indirection.* (*Venner* v. *Michigan Central R. Co.*, 271 U. S. 127, 130.)

(6) The applicable principles of law are elementary.

In *Interstate Commerce Commission* v. *G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302, the headnote correctly summarizes the decision as follows:

> "The District Court was bound by Interstate Commerce Commission's construction of its certificate of public convenience and necessity issued to motor carrier and hence such certificate and construction could not be attacked collaterally by carrier in Commission's action to restrain carrier from committting acts unauthorized by certificate."

In the course of its opinion, the court there said (p. 303) that: "The authorities on this point are too numerous to be cited here".

Many of these authorities are collected in 73 C. J. S. §146 in substantiation of the statement, (p. 479):

> "The order or determination of an administrative body, acting within its jurisdiction and under authority of law, is not subject to collateral attack, in the absence of fraud or bad faith."

See also *Village of Mantorville* v. *Chicago Great Western R. Co.*, 8 F. Supp. 791, 795.

A fortiori is this true where the collateral attack is on the determinations of an administrative agency of another jurisdiction and sovereignty not a party,—in the present

case an administrative agency of the United States Government acting in its exclusive field of foreign commerce.

The collateral attack here attempted savors of "the doctrine of interposition" by a state against federal action in a field of exclusive federal jurisdiction.

(7) Since, for the purposes of the Tariff Act, tax-free liquor is to be made available at ports of export for passengers on foreign bound planes, an agency for taking orders must be implemented at such ports and its operations must be controlled by Customs' supervision and Customs' approved forms, from the bonded warehouses to the point of foreign destination, precisely as here. The Federal Government has the right to select the means for exercising its powers. (*McCulloch* v. *Maryland*, 4 Wheat. 315, 409.)

That is exactly what is being done by the National Government in furtherance of foreign commerce and the national interests involved therein not only at the Port of New York but at Boston, along the Rio Grande, and at the California-Mexico border. (See Appendices, *post*.) Moreover, what the National Government is thus doing at the Port of New York and at other American ports is integrated in, and with its reciprocity agreements with foreign countries. (R. 151; Title 19 U. S. C. §§1351, *et seq.*)

The National Government is also similarly acting for tax-free foreign commerce in merchandise other than wines and liquors. (Title 19, U. S. C. §§1308, 1311.)

(8) The appellants' brief argues (p. 20) that the court below has invented a standard of "reasonableness". All the decisions cited in Point II, p. 11, *supra*, draw the identical distinction between total inhibition and regulations reasonably designed to prevent diversion.

POINT VI

The Twenty-first Amendment, the Wilson Act, the Webb-Kenyon Act, and the Federal Alcoholic Administration Act have no bearing here.

These enactments are cited in the appellants' brief at page 34.

The answer to them all is that, under Sections 1308 and 1311 of the Tariff Act and the regulations thereunder, these bonded liquors from the moment they are entered in bonded warehouse enter into and constitute bonded foreign commerce and continue as such until exported into foreign countries by foreign-bound planes.

They at no time enter into the internal domestic commerce of the State of New York.

Hence, neither by their terms nor by the practice under them do the enactments mentioned have jurisdiction over these foreign-bound liquors.

Moreover, as to the Federal Alcoholic Administration Act, the appellants have missed the force of the language quoted in their own brief (p. 34) to the effect that this Act applies to engaging "in the business of purchasing for resale at wholesale distilled spirits, wine or malt beverages". (Title 27, U. S. C., 203(c)(1).)

The plaintiff is not so engaged.

Respectfully submitted,

KELLY & SCHWARTZ,
Attorneys for Plaintiff-Appellee,
1780 Broadway,
New York 19, New York.
CO 5-2056

CHARLES H. TUTTLE,
JOHN F. KELLY,
Of Counsel.

APPENDIX A

Ruling of the Massachusetts Alcoholic Commission

[LETTERHEAD OF]

THE COMMONWEALTH OF MASSACHUSETTS

THE ALCOHOLIC BEVERAGES CONTROL COMMISSION

Rooms 806-818, 24 School Street, Boston 8

May 16, 1962

Julius H. Soble, Esq.
68 Devonshire Street
Boston 9, Massachusetts

Dear Sir:

The members of the Commission have carefully read and considered the contents of your letter of February 21st with reference to an intended operation by Kappy's Export Products, Inc. of an In-Bond concession in an area of space leased to it at the East Boston Airport by the Massachusetts Port Authority.

The members of the Commission are of the opinion that the intended operation as outlined and explained in detail is in no wise or in any aspect subject to the requirements of Chapter 138 of the General Laws, as amended.

Very truly yours,

ALCOHOLIC BEVERAGES CONTROL COMMISSION

WILLIAM H. HEARN
William H. Hearn
Executive Secretary

WHH/RMV

Appendix A

68 Devonshire Street
February 21, 1962

Alcoholic Beverages Control Commission
24 School Street
Boston 8, Massachusetts

Gentlemen:

This office represents Kappy's Export Products, Inc., a Massachusetts corporation, the lessee of space from the Massachusetts Port Authority to be located in the outbound lobby of the international section of Logan Airport, Boston, Massachusetts.

The above-named corporation intends to operate an In-Bond concession which will provide in-bond sales of alcoholic beverages, tobacco products, perfumes and other items to passengers and/or aircraft for consumption and/or use at points outside the continental limits of the United States, territories and possessions thereof, departing from Logan International Airport and destined to points outside the continental limits of the United States, territories and possessions thereof.

In substance, the operation of said lessee corporation will be as follows:

1. It will maintain in the aforementioned outbound lobby of the international section counterspace for the taking of orders from passengers departing from the United States.

2. It will have a United States Customs Bonded warehouse at said premises where it will store alcoholic beverages acquired in-bond from suppliers.

3. The orders will be filled by the withdrawal of said alcoholic beverages under Customs supervision and delivered to the planes' steward, with delivery to the passengers by said steward after its departure from the United States at the foreign destination.

4. The passenger would only receive an invoice from my client at the time of the placing of the order. The alcoholic beverages will be delivered to the airline on approved documents for export with the delivery to the passenger at the foreign destination of the passenger.

5. The alcoholic beverages to be acquired by my client will always be in-bond, duty and tax free and the entire operation from beginning to end will be subject to conformity with Internal Revenue and Customs requirements.

Many of the proposed suppliers of alcoholic beverages to my client have requested confirmation from your Commission that pursuant to the provisions of C. 138 (The Liquor Control Act) my client will not require any license or permit from the Licensing Board of the City of Boston or from your Commission in the operations outlined above. I will appreciate your written advice with respect to this matter at your earliest convenience.

Very truly yours,

Julius H. Soble

JHS:ae

APPENDIX B

Letter of Counsel of the Ammex Warehouse Company to the Arizona Department of Liquor Licenses

October 12, 1961

Mr. John A. Duncan, Superintendent
State Department of Liquor Licenses
and Control
Arizona State Capitol Building
Phoenix, Arizona

Re: *Ammex Warehouse Company*

Dear Mr. Duncan:

I am writing this letter pursuant to my hearing before you last week. My client, Ammex Warehouse Company, intends to operate an export business in spirituous liquors and other non-alcoholic items in the City of Nogales, Arizona. I am writing this letter to you in order to obtain a clearance from your department that my client's operation will not require licensing by your department, and, further, that its proposed operations as outlined here are not governed by any of the State's regulatory provisions regarding spirituous liquors.

The operations will be, as follows: Ammex Warehouse Company will purchase spirituous liquors from sources outside of the State of Arizona, and, also, from sources outside the United States, which sources have the spirituous liquors for sale and have them stored in bonded warehouses within the United States. These warehouses are either bonded under Internal Revenue laws or else under United States Customs' bonds. The liquor is then removed from

these warehouses and consigned to the Collector of Customs, Nogales, for Ammex Warehouse Company. The liquor is transported by bonded carriers to Nogales. The liquor is then unloaded in Nogales at the Ammex' warehouse under the supervision of a Customs' officer, who inventories it and compares it with the warehouse's entries, which must be filed with the Collector of Customs in the District from which the shipment originates. Still under Customs' jurisdiction and supervision, it is then removed and stored in the Ammex' bonded warehouse in Nogales and cannot be removed without the making of an appropriate withdrawal entry under Customs' supervision. A full-time Customs' officer is on duty at the Ammex' warehouse to supervise and control the withdrawal from the Ammex' bonded warehouse for exportation. Ammex Warehouse will accept orders for sales of the liquor in Nogales, Arizona, for direct exportation into Mexico. Upon a sale being made, the liquor is removed from the Ammex' warehouse and it is transported under United States Customs' cartment bond to the Customs' office at the border crossing, where the liquor is delivered to the customer under supervision of the United States Customs' service, who certifies that the liquor is then immediately exported into Mexico by the customer.

In effect, this operation is the importation of spirituous liquor into the State of Arizona solely for exportation into Mexico. The United States Customs and Immigration Service maintains exclusive custody and control over all liquor imported into the State, and further insures and certifies its ultimate exportation. Thus, under the applicable Federal Statutes and Decisions of the United States Supreme Court (19 USCA §§1551, et seq. and 19 USCA §§1308, et seq. and McGoldrick vs. Gulf Oil Corp., 309 US 414, 60 S. Ct. 664), the spirituous liquor while being trans-

ported into Arizona and stored here prior to exportation is in foreign commerce and is thus never within the regulatory provisions or jurisdiction of the State, and any regulation or taxing by the State would impose a restraint on foreign commerce and thus be in violaion of the United States Constitution (Article 1, Sec. 8, Clause 3, and Article 1, Sec. 10, Clause 2).

My client, Ammex Warehouse Company, is presently conducting this type of business in the State of Texas at the various Mexican border points within that State. The Texas authorities have approved such operations as not being within their power and jurisdiction to in any manner regulate or control.

After you have had an opportunity to discuss this matter with the Attorney General and your assistants, I would appreciate a written clearance from your department to the effect that my client's proposed operations do not come within the regulatory provisions regarding spirituous liquors of the State of Arizona, and that no authority will be required from your office in order to conduct the proposed operations as outlined above.

I am sure you will give this your usual prompt attention.

Very truly yours,

BEER, SEAMAN & POLLEY.
Paul Beer

PB/lhw

APPENDIX C

Reply Opinion of the Arizona Attorney General

November 22, 1961
Letter Opinion No. 62-1-L

REQUESTED BY: Mr. John A. Duncan, Superintendent
Liquor Licenses and Control

OPINION BY: ROBERT W. PICKRELL, The Attorney General

QUESTION: May the State Liquor Department exercise jurisdiction over the importation of spirituous liquor which is stored in a U. S. bonded warehouse at Nogales, Arizona, and later transported by U. S. bonded cartmen to the Mexican border where it is delivered to a customer under the supervision of the U. S. Custom Service and under certification by the custom officer that it will be immediately exported into Mexico by the customer?

CONCLUSION: No.

United States bonded warehouse and United States bonded transportation is provided for in 19 U. S. C. A. §§1551-1565 and 26 U. S. C. A. §§5521-5523. Under Article 1, Section 8 of the U. S. Constitution, the United States Congress is given power "to regulate commerce with foreign nations, and among the several states * * *." Article

Appendix C

1. Section 10 of the Constitution, provides that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws * * *." 15 C. J. S. *Commerce*, §11, states:

> "Broadly speaking, a state is without power to regulate, prohibit, prevent, restrict, obstruct, burden, impede, or interfere with, interstate or foreign commerce; and this being true, power to control, regulate, or burden interstate commerce cannot, of course, be delegated by the state to, or exercised by, a municipal corporation, a state commission, or a state court. A state may not directly regulate, prohibit, or burden interstate or foreign commerce, or rights flowing proximately therefrom, even though, as noted infra §14, congress has not exercised its paramount power. The commerce clause of the federal constitution impliedly withholds (sic) from the several states the power to regulate commerce among themselves; it impliedly forbids the exercise of such power by them; and, of its own force, it restrains them from imposing direct burdens on interstate commerce."

It appears, then, that the crux of the present situation is whether or not the liquor ever leaves interstate and or foreign commerce to become a part of the general mass of property of the State of Arizona and thus subject to the regulation of the state.

In the case of *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 84 L. Ed. 840, the United States Supreme Court considered the validity of a New York City sales tax on the sale of fuel oil. In that case crude oil had been shipped from a foreign company to a U. S. bonded warehouse in New York City where the fuel oil had been manufactured

under the terms of the U. S. bonding statute. The fuel oil was then taken from the warehouse and delivered alongside foreign bound vessels at the New York City port. The oil was purchased for the ships' stores for consumption as fuel in propelling them in foreign commerce. It was contended by the city comptroller "that since the fuel oil came into existence in New York City and passed into the ultimate consumers hands in New York City," the tax was not invalid. The court rejected this argument, and in concluding that the tax must fail as an infringement on the congressional regulation of commerce, the court stated, as part of its reasoning:

> "For the present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation."

From this we are led to the conclusion that when the goods are shipped to a United States bonded warehouse and when they are transported by bonded cartmen they remain in the flow of commerce and therefore do not become subject to state regulation under existing statutes.

It is our opinion that under present statutes the State Liquor Department is without jurisdiction to regulate by taxes or under the licensing laws an import-export business operating completely under the United States Bonded Warehouse Statutes.

We do not by this opinion imply that the state legislature could not pass appropriate legislation that could regu-

late this type of commerce provided such legislation would not tend to prohibit or interfere with interstate commerce. That the state may regulate interstate liquor transportation to some degree has been established. It need not infringe the commerce clause of the federal constitution; *Carter* v. *Virginia*, 321 U. S. 131, 88 L. Ed. 605, 64 S. Ct. 464; see footnote 2, 93 L. Ed. 890. Such acts could not conflict with the Federal Bonded Warehouse Statutes, 19 U. S. C. A. 1551.

ROBERT W. PICKRELL
The Attorney General
DARRELL F. SMITH
Special Assistant
Attorney General

DFS:lmh
No. 62-1-L

APPENDIX D

Final Judgment of Injunction Against the Texas Liquor Control Board

IN THE

53RD DISTRICT COURT
OF
TRAVIS COUNTY, TEXAS

No. 123,485

AMMEX WAREHOUSE COMPANY, INC.

v.

THE TEXAS LIQUOR CONTROL BOARD ET AL.

FINAL JUDGMENT

On the 7th day of March, 1962, came on to be heard the above styled and numbered cause, and came the Plaintiff, AMMEX WAREHOUSE COMPANY, INC., by and through its attorneys of record, and came the Defendants, THE TEXAS LIQUOR CONTROL BOARD, SUMMERS A. NORMAN, W. D. NOEL and WILSON HEARD, JR., who together constitute THE TEXAS LIQUOR CONTROL BOARD, COKE STEVENSON, JR., Administrator of the Texas Liquor Control Act, and JAMES STANFORD, the Assistant Administrator of the Texas Liquor Control Act, by their attorneys of record, and the parties announced ready for trial, whereupon no jury having been demanded,

the case proceeded to trial before the Court. The Court, after having considered the pleadings, heard all of the evidence and argument of counsel, finds:

a. The law and the facts are with the Plaintiff by reason of which judgment should be entered herein for the Plaintiff.

b. The temporary injunction heretofore granted by the Court herein, being restricted in application to the Plaintiff's operation at Laredo, Texas, is not sufficiently broad that if made permanent, it would provide the Plaintiff with all of the relief to which it is entitled, by reason of which it should be dissolved and a permanent injunction broad enough to cover the business of the Plaintiff (as that business will be defined in the judgment following) anywhere within the State of Texas should be granted for the reason that otherwise, irreparable damage and injury will be caused to the Plaintiff in that Defendants have asserted, and by their actions assert, that the Plaintiff cannot lawfully engage in its said business within the State of Texas and will, unless such injunction is granted, use the penalties and sanctions provided for in the Texas Liquor Control Act to stop the Plaintiff from engaging in its said business. The business in which the Plaintiff is engaged (and which is described in the judgment following) is a lawful business authorized and conducted under certain laws of the United States (which will be more particularly referred to hereinafter in this judgment) designed to promote and encourage foreign commerce, and the right of the Plaintiff to engage in such business cannot be prohibited, regulated or interfered with by the Defendants, but Defendants nevertheless assert, and by their actions attempt, to deprive Plaintiff of its said right to engage in such business. This would cause irreparable damage and harm

to the Plaintiff in that the Plaintiff has invested thousands of dollars in organizing and getting such business in operation, has thousands of dollars invested in stocks of liquor stored in its bonded warehouse at Laredo, Texas where it has arranged for the assignment to the warehouse of a full-time U. S. Customs officer pursuant to the laws of the United States, has entered into leases and other contracts, executed numerous and substantial bonds of the United States and its agencies, has employed several employees and generally done other acts necessary for engaging in any business, and for this loss, no recovery in damages can be had against Defendants or the State of Texas.

It is, therefore, ORDERED, ADJUDGED, DECREED and DECLARED as follows:

1. That the temporary injunction heretofore granted herein be, and it is hereby, dissolved.

2. That the Texas Liquor Control Act (Art. 666-1, et seq., Vernon's Annotated Penal Code) is worded so as to be broad enough to cover and apply to the Plaintiff, AMMEX WAREHOUSE COMPANY, INC., in connection with the business in which it has been engaged and intends to continue to do (as that business is herein described, and this judgment is restricted in application to such business as described), but it was and is beyond the constitutional power of the Legislature to make said Act apply to the Plaintiff, AMMEX WAREHOUSE COMPANY, INC., in connection with its said business herein described. Therefore, in line with settled rules of statutory construction, it is declared, adjudged and decreed that said Act shall not apply to Plaintiff, AMMEX WAREHOUSE COMPANY, INC., so long as Plaintiff engages in the business herein described, and any and all acts or attempts to act on the part of the Defend-

ants, THE TEXAS LIQUOR CONTROL BOARD, SUMMERS A. NORMAN, W. D. NOEL and WILSON HEARD, JR., who together constitute THE TEXAS LIQUOR CONTROL BOARD, COKE STEVENSON, JR., Administrator of the Texas Liquor Control Act, and JAMES STANFORD, the Assistant Administrator of the Texas Liquor Control Act, to apply such Act to the Plaintiff insofar as its said business as herein described is concerned, are void and of no force and effect. The said business of the Plaintiff, AMMEX WAREHOUSE COMPANY, INC., which is by this judgment excepted from the application of said Texas Liquor Control Act, is that of selling liquor in foreign commerce on which no Federal or State taxes, or U. S. Customs duties, have been paid because such liquor at all times has been bought, imported, stored, transported, handled, sold and exported while under bond to the United States or its agencies pursuant to law authorizing "in bond" handling of merchandise for export purposes as contained in the U. S. Tariff Act of 1930, as amended (19 U. S. Code, §1301 et seq., including, without intending to limit, the operations to the particular section stated, §1308, 1311, 1553, 1554, 1555, 1556, 1557, 1558, 1564, 1565, 1585, 1586, 1592, 1594, 1595, 1623 and 1646, respectively), and/or 26 U. S. Code, §5521, 5522, 5232, 5242, 5243, 5247, and/or all regulations, rules and orders of the Secretary of the Treasury of the United States, the U. S. Bureau of Customs and the U. S. Internal Revenue Service, which are in furtherance of said laws so enacted by the Congress of the United States. If at any time Plaintiff causes any liquor to be withdrawn from bond while within the State of Texas so that it is required to pay to the United States customs duties and/or revenue taxes, then, as to such liquor and any business done in connection therewith, the Plaintiff will be subject to the provisions of said Texas Liquor Control Act, and it shall apply to Plaintiff.

Appendix D

3. That the Plaintiff be, and it is hereby, granted a permanent injunction against The Texas Liquor Control Board, Summers A. Norman, W. D. Noel, and Wilson Heard, Jr., who together constitute The Texas Liquor Control Board, Coke Stevenson, Jr., Administrator of the Texas Liquor Control Act and James Stanford, the Assistant Administrator of the Texas Liquor Control Act, jointly and severally, and their agents, employees, representatives, officers and attorneys, and their successors in office, each of whom and which are jointly and severally referred to as the Defendants. Accordingly, said Defendants and their successors in office, be, and they are hereby, permanently enjoined from in any wise, directly or indirectly, interfering with, controlling or regulating the Plaintiff, AMMEX WAREHOUSE COMPANY, INC., in the operation and conduct of its said business anywhere in the State of Texas as that business is defined in preceding Paragraph 2 of this Judgment. The injunction here ordered applies, notwithstanding the fact that Plaintiff, its agents, officers or employees may effect delivery of a quantity of liquor within the boundaries of the State of Texas, so long as such delivery is effected under and pursuant to authority and supervision of the U. S. Bureau of Customs and/or the U. S. Internal Revenue Service while in bond under said laws of the United States for the purpose of exporting such liquor from the United States, but it does not extend to any withdrawal by Plaintiff of any quantity of liquor from bond within the State of Texas if such liquor is not to be exported and Federal, State and U. S. Customs duties are paid thereon. The injunction here granted extends to and enjoins the said Defendants and their successors in office from in anywise attempting to enforce said Texas Liquor Control Act against persons, firms or corporations who, or which, supply liquor in bond to Plaintiff, or who transport it in bond to the Plaintiff's warehouses, or store it in

bond (the bonds referred to being bonds to the United States or its agencies pursuant to procedures set forth in said laws of the United States), and in anywise from indirectly doing what they and each of them are directly enjoined from doing herein. This injunction is granted for the reasons stated in foregoing findings.

4. Costs of suit are adjudged against the Defendant THE TEXAS LIQUOR CONTROL BOARD.

SIGNED FOR ENTRY this 21st day of May, 1962.

s/ HERMAN JONES
Judge Presiding